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Loving it to Pieces: EU Law in US Legal Academia, Revisited

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The Editors of this Special Issue have kindly invited me to update earlier reflections on the state of EU law in US legal academia. For a variety of reasons, it is important to me not to mislead the reader with the false promise of some kind of summa. What follows is my own perception of a complicated landscape, which I shall sketch lightly here in the hope of prompting other scholars of EU Law to report on their own US experience.

Through the 1980s only a handful of US-based international law scholars had been paying close attention to the curious evolution of the EEC experiment, from a post-WWII international treaty to a unique legal architecture for regional economic governance, endowed with its own law makers, judges, executives, and of course politics. In the 1990s, however, EU law stopped being a *niche* interest for academic émigrés. It became instead a self-contained course for JD candidates in top-tier law schools, enrolled in enough courses to receive a dedicated Westlaw casebook just as the Treaty of Maastricht was entering into force (2). Most importantly, EU law began to matter as a 'field' of scholarship in its own right. Articles analysing the legal nature of the European Union, as well as its significance in the study of regional governance, would be published not just in Europe, but also in the flagship journals of top US law schools. A significant cohort of leading American scholars became enthralled with the unusual legal construct that the European Union embodied, and even the US judiciary experienced some sort of Europhilia. It became possible, then, for rookie academics to list EU law as a primary research interest on their resumes and actually have a seat at the table of US legal discourse – not to mention, in some cases, a tenure-track faculty appointment.

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How did that come to be? What was the recipe for such success? The brilliance of the field's pioneers surely had a lot to do with it, but it could not, in and of itself, suffice. An additional feature of that epoch was an enhanced sense of transatlantic convergence – and indeed of transatlantic hegemony. The 1990s, ushered in by the iconic fall of the Berlin Wall, were the zenith of epistemic convergence between Europe and the US. Third-way politics and Washington-consensus tenets grew in dis-

1. Professor of Law and Jean Monnet Chair, Boston University School of Law. Director, Center for the Study of Europe, Boston University Pardee School of Global Studies.
2. Bermann, Goebel, Davey & Fox, *Cases and Materials on European Community Law* (West Group, 1993).

cursive prominence, to the point of overshadowing the (clear!) signs of forthcoming ruptures. In the wake of 9/11, the cry '*nous sommes toutes Américaines*' aptly captured the *fin-de-siècle* sense of transatlantic comity. Yet again, this sort of kinship would not have been enough for EU law to conquer the legal analytics of élite American jurists. The *sine qua non* was, in my view, the relevance of EU law discourse to the law and politics of the Rehnquist Court.

Appointed to the role of Chief Justice in 1985, William Rehnquist spearheaded what we now know as the federalist revolution, openly aimed at restoring what he (and many others) envisioned as the proper balance between States and federal government. Through the 1990s, in a sequence of high-profile cases, the US Supreme Court construed the sphere of States' powers in the broadest possible terms, and correspondingly narrowed the scope of federal regulatory intervention. The political controversy surrounding such cases cast doubt on the court's allegedly strict adherence to the Constitution. It became therefore important, for scholars aligned with the Rehnquist jurisprudence, to push back against charges of ideological conservatism. It was in this climate that the story of European legal integration gained traction in US legal academia. The EU narrative spoke to the anxieties of US constitutionalists, but it did so out of context and in a style that was ideologically opaque. For those interested in rephrasing the question of federalism in neutral language, EU parallels offered an extraordinary opportunity. As Ernest Young explained, '[c]onsidering issues of federalism in the context of Europe... helps us shed some of the historical baggage hindering present debate, and it demonstrates that any number of different federal settlements may be workable and legitimate'. Through the 1990s, EU comparisons served the goal of depoliticising the US conversation on States' rights, lending doctrinal fortitude to the Rehnquist Court's agenda.

As the 21st century began, the obsession of the US legal academy with the Rehnquist Court's jurisprudence lost its urgency, overcome by other implosions in society and governance, and the post-9/11 realignments did away with the 1990s rhetoric of transatlantic convergence. All the while, the political economy of EU law had become so complex that the field could no longer serve as a depoliticised object of US federalist inquiry. With the dawn of the new millennium, it became clear that reflections on the constitutional nature of the EU had gone as far as

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they could towards permeating core legal writing in America. An illustration may be helpful here. Daniel Meltzer, then part of the Harvard law faculty, took interest in the *Francovich* jurisprudence and wrote a characteristically sharp article on the doctrine of state liability, highlighting inverted patterns of State accountability in the US doctrine of sovereign immunity. In the 1990s this notable comparison might have counted as an authoritative contribution to critical issues in US public law. In the 2000s, however, it was both conceived and received as a self-contained exercise – impressive, to be sure, but no longer central to American legal discourse. More generally, the tone of the discussion on European legal integration changed. The interest in EU law did not suddenly vanish, but it morphed in ways that rocked the subject out of balance. In fact, what morphed was the very understanding of EU law, now consisting of a conglomerate of themes as opposed to a locus of interlocking analytics.

EU law is now a conglomerate of themes rather than a locus of interlocking analytics

Into the 2010s, the process of fragmentation grew deeper (3). Some legal features of the EU's outward-facing policies were of the kind that US legal scholars simply could not ignore: trade and foreign investment (in the context of the TTIP negotiations); international taxation (under the aegis of the OECD's coordination efforts); and global antitrust enforcement (the Microsoft saga). New chunks of EU law also acquired distinct visibility in US legal circles. For example, when CIA atrocities in European black sites were revealed in Strasbourg, US scholars of national security law took notice (yes, in the US as in Brexiteer milieus, the ECtHR jurisprudence is often lumped up with EU law matters). But much of EU law became good for a variety of comparative law projects: a basket of discrete pieces, potentially useful for all stripes of legal research, completely severable from one another, and probably more interesting than the whole that had generated them.

This is, in my view, the current state of EU law in US legal academia. While still of great importance to American political scientists and historians, the EU's atypical nature and existential struggles are by now no more relevant in American law schools than many other regional legal constructs around the globe. To give just one example, it is hard to get US legal scholars excited about the BVerfG's *Weiss* decision of last May, even though that judicial saga was a veritable show stopper in EU law circles, especially given the wrangling over COVID -19 rescue funds. From the American side of the pond, after the Brexit earthquake, the Solange saga and its current reverberations look like tempests in a teapot. The 1990s notion of EU law as a cohesive field no longer exists.

Yet the bits resulting from its balkanis ation, each under a different name, may still belong officially in mainstream American legal discourse, not just as foreign curiosities but as essential contributions towards understanding historical junctures (4) and reframing difficult inquiries. If the story of EU law in

3. Franz C. Mayer, *EU law scholarship from a German perspective*, in this Weekend Edition.
4. Mitchel de S.-O.-l'E. Lasser, *Judicial Dis-Appointments. Judicial Appointments Reform and the Rise of European Judicial Independence* (OUP, 2020).

If the story of EU law in US legal academia is a rise-and-fall parable, then the fall brings about fracture rather than extinction

US legal academia is a rise-and-fall parable, then it is one in which the fall brings about fracture rather than extinction. I take it as my task now to enumerate the pieces of EU law that in my view are likely to remain relevant to US legal scholarship, or to become even more important in the 2020s.

One such piece is the regulation of big tech, writ large. This is not only due to the Brussels effect (5), which generates new compliance duties for US firms dealing with EU customers, but also to the European penchant for conceptualisation. American legal scholars look closely at the GDPR not just because it materially affects GAFA et al., but also because it outlines an embryonic legal architecture for the data economy, cognisant both of market dynamics and of fundamental rights. America's Fintech is likewise plagued by hair-raising ethical and distributional issues which have been more readily foregrounded in Europe than in the US. The EU's legal debate in such fields, including the regulation of blockchains and the taxation of the digital economy, may have no ready answers for the Biden administration, but it has already formulated all the questions. Perhaps most importantly in the field of technology, green energy demands coordinated legal architectures. There are two Green Deals on the table, one on each side of the Atlantic, and each is being pitched by its proponents as a strategy of domestic economic recovery. The clashes, starting with subsidies and non-tariff barriers, are totally predictable, and transatlantic coordination through law is essential to the success of global greening strategies.

The rise of populist movements is generating, as well, a strand of EU legal scholarship that is clearly relevant to America's own law-and-politics tangle. On this front, US-based jurists have been paying attention. Steven Bannon's trips to multiple European capitals, as well as his faith in a world-wide nationalist-populist revolt, have led American legal scholars to focus on the rise of the European far right. EU lawyers bring to this conversation not only their familiarity with the dark legacies of continental authoritarianism, but also their ongoing quest for legal mechanisms to rein in those Member States in which the boundaries between executive and judiciary branches are being blurred by populist leaders.

5. Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP, 2019).

Most crucial today, in my view, is the transatlantic debate about law and racism. 'We are here because you were there' is an anti-racist slogan that speaks volumes, in the old continent, about the need to revisit the legal dynamics of European colonialism, old and new. Reparation for exploitative practices is a legal notion in need of development. Rather than a closed chapter of European history, the implementation of beggar-thy-neighbour policies continues to occur today through EU law and EU-led actions, most notably vis-à-vis Mediterranean migration and in the context of environmentally suspect trade agreements with the Global South. European inquiries on police brutality (6) are rightly commanding attention in the US, given the resonance of the Black Lives Matter movement among American legal scholars. New forms of moral and material injustice (the new racial capitalism) require a more textured legal vocabulary than is to be found in European anti-discrimination law or in the conceptual frame of secularism, and American academia can lend both its own experience and a friendly ear to such endeavours. The same applies to the ongoing critique and reconstruction of the international human rights regime (7).

While I expect US legal scholarship to engage significantly with these and other discrete pieces in the forthcoming years, I don't foresee EU law regaining its former disciplinary unity in American law schools. The question is whether other paths of epistemic coherence will emerge from the fragments of this field. Here is one desirable path. European and American jurists alike will do well to engage with the analytics of distribution. Thomas Piketty laudably triggered a renewed conversation on the economics of capitalism, but jurists must carry the baton much further. The time is ripe for transatlantic dialogue on all the legal constructs that still enable and normalise inequality and exclusion. Just as in the US, in Europe there is a renewed focus on the fact that law – including EU law in its most technical aspects – is an engine of distribution of both power and resources. A pervasive distributive analysis of every corner of EU law is essential to tackle inequality, not only downstream through ex-post redistribution, but at its source (8). The transatlantic laboratory of distributive analysis that is currently emerging may well generate new meaningful synergies and, with time, string some EU law pieces back together.

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6. Eddie Bruce-Jones, *Race in the Shadow of Law. State Violence in Contemporary Europe*, Routledge, 2017.
7. Gráinne de Búrca, *Reframing Human Rights in a Turbulent Era* (OUP, 2021).
8. Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality*, (Princeton University Press, 2019).